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From: Presidency

To: Working Party on Civil Law Matters (Contract Law)

No. prev. doc.: 15674/16, 6233/17, WK 2137/2017

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Subject: Proposal for a Directive on certain aspects concerning contracts for the supply of digital content
- Revised compromise text proposal on Article 12 and Article 13a(1)"

Following the discussion held at the meeting of the Working Party on Civil Law Matters (Contract Law) on 16 and 17 March 2017, and taking note of the comments made during that meeting, the Presidency would like to put forward a new revised text proposal for Article 12 and Article 13a(1) for consideration by delegations.

This proposal builds further on the last compromise (as set out in WK 2137/2017) between the two alternatives of Article 12 (set out in documents 15674/16 and 6233/17).

Changes compared to the Commission proposal are marked by **bold** for changes/additions and by (...) for deletions. Changes compared to the text in working document WK 2137/2017 are shown in **bold underlined** and ~~striketrough~~.

The Presidency would like to continue the discussion on this proposal for a compromise text on Article 12 during the Working Party on 27 and 28 April 2017, and thanks delegations for their spirit of compromise.

Remedies for the lack of conformity

- 01. In the case of a lack of conformity, the consumer ~~may request~~ shall be entitled to have the digital content or digital service brought into conformity, or to have an appropriate reduction in the price, or to terminate the contract under the conditions set out in this Article.**
1. The consumer shall be entitled to have the digital content **or digital service** brought into conformity ~~free of charge~~, unless this **would be impossible¹ or would impose costs on the supplier that would be disproportionate, taking into account the circumstances of the case including (...):**
- (a) the value the digital content **or digital service** would have if **there were no lack of conformity;**
and
- (b) the significance of the lack of conformity (...).
2. The supplier shall bring the digital content or **digital service** in conformity (...) pursuant to paragraph 1 within a reasonable time,² from the time the supplier has been informed by the consumer about the lack of conformity, (...) **free of charge** and without any significant inconvenience to the consumer, taking account of the nature of **the digital content or digital service** and the purpose for which the consumer required this digital content **or digital service.**³

¹ A recital will clarify that the notion of ‘impossibility’ covers not only factual impossibility but also situations where bringing the digital content or digital service into conformity would not be possible due to any legal reason or impediment.

² A recital could clarify that nothing prevents the consumer and the supplier from agreeing on a time within which the supplier will bring the digital content or digital service in conformity.

³ A recital (and not article 3(9)) would clarify that the Member States have the possibility to regulate the consumer's right to withhold payment until the supplier has brought the digital content or digital services in conformity. It would also clarify that Member States are free to regulate whether the supplier shall be entitled to retain any reimbursement due to the consumer on termination of the contract until the consumer complies with his obligation to return the tangible medium to the supplier.

Proposed text to be added in Recital 10: "*Member States should also remain free to regulate the rights of the parties to withhold the performance of their obligations or part thereof until the other party performs its obligations. For example, Member States should be free to regulate whether the consumer, in cases of lack of conformity, shall be entitled to withhold payment of the price or part thereof until the supplier has brought the digital content or digital service into conformity, or whether the supplier shall be entitled to retain any reimbursement due to the consumer upon termination of the contract until the consumer complies with his obligation under Article 13b(2) to return the tangible medium to the supplier.*"

3. The consumer shall be entitled to **demand** either an ~~(...)~~ **appropriate** reduction of the price **in the manner set out in paragraph 4** where the digital content or digital service is supplied in exchange for a payment of a price, or **the termination of the contract in accordance with paragraphs 5 to 6** (...), **in any of the following cases:**
- (a) the remedy to bring the digital content **or digital service** in conformity is impossible⁴ or disproportionate **in accordance with paragraph 1;**
 - (b) the supplier has not **brought the digital content or digital service in conformity with the contract within a reasonable time or without any significant inconvenience to the consumer in accordance with paragraph 2;**
 - (ba) **a lack of conformity appears despite an soon after the supplier's attempt by the supplier to bring the digital content or digital service in conformity; provided that in contracts referred to in Article 16(1) the lack of conformity appears soon after the first lack of conformity;**
 - (c) **the significance of the lack of conformity is of a serious nature and bringing the digital content or digital service in conformity would cause a significant inconvenience to the consumer; or such as to justify the immediate price reduction or termination of the contract.**
 - (d) the supplier has declared, or it is equally clear from the circumstances, that the supplier will not bring the digital content **or digital service** in conformity **within a reasonable time or without significant inconvenience for the consumer.**
4. (a) —The reduction in price shall be proportionate to the decrease in the value of the digital content **or digital service supplied to the consumer compared to the value that the digital content or digital service would have if it was in conformity.**
- (b) —Where the contract stipulates that the digital content or digital service shall be supplied over a period of time in exchange for the payment of a price, the reduction in price shall be proportionate to the period of time during which the digital content or digital service has not been in conformity.

⁴ See footnote 1.

(e) —The supplier shall reimburse the consumer under this paragraph without undue delay, and in any event ~~within~~ not later than 14 days⁵ from the day on which the supplier is informed of the consumer's decision to invoke his right for a price reduction.⁶

(d) —The supplier shall give the refund using the same means of payment as the consumer used to pay for the digital content or digital service, unless the consumer expressly agrees otherwise ~~{and provided that the consumer does not incur any fees as a result of such reimbursement}~~.⁷

(e) —The supplier shall not impose any fee on the consumer in respect of the refund.

5. (a) —Where the digital content or digital service has been supplied in exchange for the payment of a price the consumer shall be entitled to terminate the contract only if the lack of conformity is not minor. The burden of proof that the lack of conformity is minor shall be on the supplier.

~~(b) —Where the contract stipulates that the digital content or digital service shall be supplied over a period of time in exchange for the payment of a price, termination of the contract by the consumer shall only be effective from the moment when the lack of conformity appeared.~~

~~6. —Where the digital content or digital service has not been supplied in exchange for the payment of a price but for personal data or other data, the consumer shall be entitled to terminate the contract under the conditions of paragraph 3 even if the lack of conformity is minor.~~

(...)

⁵ The wording used above is identical to the respective Article 13(1) of the CRD. If any further changes are made in this paragraph, we should keep in mind that Article 13a (1) should also be aligned accordingly, to remain consistent.

⁶ See footnote 3.

⁷ This added phrase aligns the provision to Article 13(1) of the Consumer Rights Directive.

Obligations of the supplier in the event of termination

1. (...) **The supplier shall reimburse to the consumer all sums paid under the contract** without undue delay, and in any event **within 14 days from the day on which the supplier is informed of the consumer's decision to terminate the contract.**

Where ~~the consumer terminates the contract in accordance with Article 12 (5) (2) for a period of time prior to termination the digital content or digital service had been in conformity, the supplier shall only reimburse to the consumer, ~~within the period specified in the previous paragraph,~~ the part of the price paid corresponding to the period of time during which the digital content or digital service was not in conformity, and any part of the price paid by the consumer in advance for any remaining period of the contract had it not been terminated.~~

The supplier shall ~~carry out the reimbursement~~ give the refund using the same means of payment as the consumer used to pay for the digital content or digital service, unless the consumer ~~has expressly agreed~~ agrees otherwise ~~{and provided that the consumer does not incur any fees as a result of such reimbursement}.~~

The supplier shall not impose any fee on the consumer in respect of the refund.

⁸ Paragraph 12(5) is moved to para 13a (1), as it concerns consequences of termination. The paragraph (as modified above) regulates the issue of partial reimbursement after termination of the contract. It does not only refer to "continuous" contracts, but to all cases where the digital content was conforming with the contract for some period of time, and therefore the consumer should only be partially reimbursed. This answers to some MS requests to add a provision on partial reimbursement also for one-off supplies.